SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 346

STONEWALL COTTON MILLS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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May it please the Court:

The petition of the Stonewall Cotton Mills, Inc., hereinafter referred to as the petitioner, shows unto the Court:

A.

Summary Statement of Matter Involved.

The petitioner was the owner and operator, at the time of the origin of the controversies involved herein, of a cotton mill at Stonewall, Mississippi, an unincorporated village containing about 2,000 people.

On May 22nd, 1940, the National Labor Relations Board, acting through its regional director, filed a complaint against the petitioner, based upon charges made by the

Textile Workers Federal Local Union No. 31723, affiliated with the American Federation of Labor. The complaint charged that the petitioner was guilty of, and was then guilty of, certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act (R. 25, with reference to transcript). The complaint charged that the petitioner refused to bargain collectively and negotiate with the representatives of the Union respecting wages, hours, and other conditions; that it interfered with, restrained and coerced its employees in violation of the act; that the petitioner discharged and refused to reinstate five employees because of Union activity, thereby discriminating against and discouraging Union membership among its employees; that the petitioner warned its employees against voting for or joining the Union, prevented them from joining the Union or brought about their withdrawal, thereby interfering with and coercing its employees within the meaning of the act.

Issue was taken upon the complaint by petitioner (R. 33). A trial examiner was appointed, who, after conducting hearings, filed a report, October 18, 1940 (R. 66). The examiner found that the petitioner had not been guilty of any unfair labor practices as to J. A. Holloman and Della Todd; that it had discriminated, however, in regard to hire and tenure as to one W. A. Taylor, G. A. Holloman and Hill Logan, and reported that petitioner had refused to bargain collectively with the Union. That it had interfered with and coerced its employees. The petitioner filed exceptions to the examiner's report before the Board (R. 148). The Board upon the 17th day of October, 1941 (R. 162) announced the following conclusions:

That petitioner had (1) discriminated in regard to the hire and tenure of employment of W. A. Taylor, C. A. Holloman and Hill Logan, thereby discouraging membership in the Union, constituting unfair labor practice within

the meaning of Section 8(3) of the act; (2) that the petitioner by refusing to bargain collectively with the Union was guilty of unfair labor practices within the meaning of the act; (3) that by interfering with its employees in the exercise of the rights guaranteed in Section 7 of the act, the petitioner was engaged in unfair labor practices within the meaning of Section 8(1) of the act; and (4) that petitioner was not guilty of unfair labor practices as to Mrs. Della Todd or J. A. Holloman within the meaning of the act.

The Board made an order (R. 162) requiring the petitioner to desist from:

> (a) Discouraging membership in the Union by discharging or refusing to reinstate or re-employ certain employees;
>
> (b) From refusing to bargain collectively with the representative of the Union;
>
> (c) From in any other manner interfering, restraining or coercing its employees in the exercise of the rights of sub-organization, etc.

The petitioner was required to take the following affirmative acts:

(a) To offer to reinstate W. A. Taylor, C. A. Holloman and Hill Logan, with reimbursement for loss of pay suffered by each of them.

(b) Bargain collectively with a representative of the Union as exclusive bargaining agent.

(c) Post and maintain notices to its employees of compliance with the order of the Board, and desist from interference.

Within the ten day period provided for in the order, the petitioner notified the regional director for the Fifteenth

Region at New Orleans, Louisiana, of its intention immediately to file its petition with the United States Circuit Court of Appeals, Fifth Circuit, that the Board's order be modified or set aside, which petition was duly filed.

The National Labor Relations Board appealed before the United States Circuit Court of Appeals, filed a cross-petition praying that the Board's order be inforced as rendered.

The case was briefed, argued and submitted before the United States Circuit Court of Appeals, Fifth Circuit, with the result that upon the third day of June, 1942, the Court handed down an opinion accompanied by an order affirming the Board's findings:

> (1) That there was refusal to bargain;
>
> (2) That there had been interference in violation of Section 8(1) of the act; and decreed enforcement of the Board's order in respect thereto.

That that portion of the Board's order requiring the reinstatement and reimbursement of Taylor, Holloman and Logan be not inforced but set aside (R. 226, 231).

The National Labor Relations Board filed a motion for rehearing (R. 233) and upon consideration thereof, the court modified its former order by affirming the action of the Board as to the reinstatement and reimbursement of Taylor, adhering, however, to its original opinion in all other respects.

Stating the matter in its simplest terms, the result of the opinions and judgments of the United States Circuit Court of Appeals was that:

> (1) The petitioner had restrained and coerced its employees as found by the Board and it was ordered to desist, in violation of Section 8, paragraph 1 of the National Labor Relations Act.

(2) Petitioner discriminated in regard to the hire and tenure of W. A. Taylor and Petitioner was directed to reinstate the said Taylor with compensation, in violation of Section 8, paragraph 3 of the act.

(3) Petitioner had refused to bargain collectively with the Union and it was ordered to desist therefrom, in violation of Section 8, paragraph 5 of the act. (R. 253, 255.)

There is involved in this case the correctness of the order of the Circuit Court of Appeals in respect to the foregoing matters.

B.

Jurisdiction.

Jurisdiction is invoked under the Judicial Code, Sec. 240, as amended by Act of February 13, 1925; 43 Statutes at Large 938, Sec. 347, U. S. Ann. Code, Title 28.

The decree sought to be reviewed dated upon the 1st day of August, 1942 (R. 255).

C.

Basis on Which It Is Contended That This Court Has Jurisdiction to Review the Judgment with Reasons for Allowing the Writ.

(1) The decision of the United States Circuit Court of Appeals decided that the Petitioner restrained and coerced its employees, in violation of Section 8, paragraph 1 of the act, which decision of the Court is in conflict with the applicable decisions of this Court in that the conclusion reached by said Court is not supported by substantial evidence. It is necessary that the finding of the Board, as well as the decision of the Court affirming or ordering the enforcement thereof, be supported by substantial testimony. In this case,

there is absolutely no testimony whatsoever in support of the finding or the decree of the United States Circuit Court of Appeals, Fifth Circuit. The findings of the Board in respect to the charge of interference and coercion will be found Rec. 174, and involves the telephone conversations, the expressions of President Oscar Berman, the expressions of employees, and the acts of the management concerning the election.

(a) In respect to the telephone conversation, the Board found (R. 165) that Harrington communicated with the manager, Berman at Cincinnati, Ohio, by long distance telephone. The only testimony in respect thereto is that of Brown (Tr. 592). The testimony of the witness in no manner tends to sustain the charge, and no other testimony was offered in respect thereto.

(b) Concerning the anti-Union expressions of President Oscar Berman, referred to in the Board's decision (R. 168), the only testimony in respect thereto was that of W. A. Taylor (Tr. 136), Paul Tood (Tr. 349), and Secretary Harrington (Tr. 1221, reference to typewritten testimony). There was no other testimony in respect thereto, and the evidence offered neither proved, nor tended to prove coercion on the part of the President or laborers; neither was there any testimony tending to show that the activities of the Union were affected in the slightest manner.

(c) Concerning the anti-Union expressions of Priester, the Board's decision in respect thereto is found Rec. 166. The entire evidence in respect thereto was found in the testimony of C. A. Holloman (Tr. 248), and Priester (Tr. 1095). The evidence neither established nor tended to establish coercion on the part of Priester, nor did it establish or tend to establish that the Union's activities were in any manner interfered with thereby.

(d) Concerning the anti-Union expressions of Richardson, the finding of the Board in respect thereto will be found Rec. 166. All the testimony in respect

thereto will be found in the testimony of C. A. Holloman (Tr. 249).

(e) Concerning the anti-Union expressions of Add Privett, the finding of the Board in respect thereto is found R. 167. The entire evidence in respect thereto is found in the testimony of Holloman (Tr. 42).

(f) Concerning the anti-Union expressions of Priester, the finding of the Board is found Rec. 170. All of the testimony in respect thereto will be found in the evidence of J. A. Holloman (Tr. 251), Priester (Tr. 1001), C. A. Holloman (Tr. 1585), Bevin Long (Tr. 393), Ben McPherson (Tr. 399). From this testimony, it appeared that the statements complained of were isolated statements amounting to nothing more than friendly banter between friends and acquaintances in a small community. The remarks took place casually, and there was no evidence that the remarks had the slightest effect in preventing or discouraging Union activities, or that the statements had any effect upon anybody.

(g) Concerning the notice November 11, 1939, given by the Petitioner of the approaching election, the finding of the Board in respect thereto will be found R. 171. All the testimony therein will be found: W. A. Taylor (Tr. 162), B. F. Berman (Tr. 1273), from which it necessarily appears that the notice of the approaching election given by the Petitioner was merely a helpful and unbiased explanation as to the purpose of the approaching election made upon the request of the employees themselves and amounted to nothing more than a correct statement of the actual situation without evidence of any kind of interference, pressure, or coercion. The following authorities are directly in point:

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; N. L. R. B. v. Columbian Co., 306 U. S. 292, 59 S. Ct. 501, 83 L. Ed. 660; International Brotherhood of Electrical Workers v. N. L. R. B., 58 S. Ct. 1041, 305 U. S. 555, 82 L. Ed.

1524; Remington-Rand v. N. L. R. B., 58 S. Ct. 1046, 304 U. S. 576, 82 L. Ed. 1540, re-hearing denied, 58 S. Ct. 1054, 304 U. S. 590, 82 L. Ed. 1549.

(a) For the same reason, the decision of the Circuit Court of Appeals of the United States is in conflict with the decisions of the following other Circuit Courts of Appeal on the same matter.

N. L. R. B. v. The Lion Shoe Co., 97 Fed. (2d) (1st Cir.) 448; Ballston-Stillwater Knitting Co. v. N. L. R. B., 98 Fed. (2d) (2 Cir.) 758; Republic Steel Corp. v. N. L. R. B., 107 Fed. (2d) (3 Cir.) 472; Martel Mills Corp. v. N. L. R. B., 114 Fed. (2d) (4 Cir.) 624; N. L. R. B. v. Gosher Rubber & Mfg. Co., 110 Fed. (2d) (6 Cir.) 432; Foote Bros. v. N. L. R. B., 114 Fed. (2d) (7 Cir.) 611; Hamilton-Brown Shoe Co. v. N. L. R. B., 104 Fed. (2d) (8 Cir.) 49; N. L. R. B. v. Grower-Shipper Assn., 122 Fed. (2d) (9 Cir.) 368.

(b) The decision of the Circuit Court of Appeals of the United States is in conflict with the decisions of other Circuit Courts of Appeal on the same matter in that the Petitioner and its agents and officers had the right to express their opinion to employees provided there is absence of interference and coercion. Friendly intercourse between the employer and employees is not prohibited by the act, and the employer has the right to express an honest opinion or state its policy and position.

Virginia Electric & Power Co. v. N. L. R. B., 115 Fed. (2d) (4 Cir.) 414; Midland Steel Products Co. v. N. L. R. B., 113 Fed. (2d) (6 Cir.) 800; Jefferson Electric Co. v. N. L. R. B., 102 Fed. (2d) (7 Cir.) 949; N. L. R. B. v. Union Pacific Stages, 99 Fed. (2d) (9 Cir.) 153; The Press Co., Inc. v. N. L. R. B., 118 Fed. (2d) (D. C.) 937.

(2) The decision of the United States Circuit Court of Appeals that the Petitioner discriminated in regard to the hire and tenure of W. A. Taylor is in conflict with the applicable decisions of this Court because unsupported by substantial evidence.

The Board found (R. 199) that the Petitioner discriminated against W. A. Taylor for Union activities by refusing to re-instate him and in refusing to reimburse him for lost time, thereby discouraging membership in the Union and coercing the employees in the exercise of their rights guaranteed under Section 7 of the act, in violation of paragraph 3, Section 8 thereof. The proof showed without conflict that on June 19, 1939, Bill Roberts was put in the place of Taylor as a roving hauler (Tr. 159). Other haulers were put on (Tr. 160). Taylor testified that none of the supervisors complained of his work (Tr. 165). He admitted that he had a brother, Harvey Taylor, working for the Petitioner who belonged to the Union (Tr. 182). He admitted that at the time he was discharged there was not enough work for three roving haulers; that it was a job for only two men (Tr. 189). He admitted that his daughter, Miss Donnie Taylor, and his son-in-law, E. N. Smith, worked at the mill (Tr. 218). The other testimony in respect thereto is found in the evidence of J. R. Brown (Tr. 600), A. F. Richardson (Tr. 622), Jim Barnes (Tr. 703), Dalton Clark (Tr. 737), Randolph Gilbert (Tr. 778), J. W. Downs (Tr. 811), Clarence Harper (Tr. 843), and Robert Walker (Tr. 1187). There was not even a scintilla of evidence in the record that the discharge of Taylor was brought about by reason of Union activities or had any effect upon the organization or operation of the Union. An employer has the right to hire and employ his servants so long as he does not discriminate against the employee on account of Union activities. The following authorities are directly in point:

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; N. L. R. B. v. Columbian Co., 306 U. S. 292, 59 S. Ct. 501, 83 L. Ed. 660; International Brotherhood of Electrical Workers v. N. L. R. B., 58 S. Ct. 1041, 305 U. S. 555, 82 L. Ed. 1524; Remington-Rand v. N. L. R. B., 58 S. Ct. 1046,

304 U. S. 576, 82 L. Ed. 1540, re-hearing denied 58 S. Ct. 1054, 304 U. S. 590, 82 L. Ed. 1549.

(3) The decision of the United States Circuit Court of Appeals holding that Petitioner discriminated in regard to the hire and tenure of W. A. Taylor and directing his re-instatement is in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

N. L. R. B. v. Air Associations, 121 Fed. (2d) (2 Cir.) 586; Quaker State Oil Refining Co. v. N. L. R. B., 119 Fed. (2d) (3 Cir.) 631; Virginia Electric & Power Co. v. N. L. R. B., 115 Fed. (2d) (4 Cir.) 414; Midland Steel Products Co. v. N. L. R. B., 113 Fed. (2d) (6 Cir.) 624; N. L. R. B. v. Illinois Tools Works, 119 Fed. (2d) (7 Cir.) 356; Wilson & Co. v. N. L. R. B., 103 Fed. (2d) (8 Cir.) 243; N. L. R. B. v. Union Pacific Stages, 99 Fed. (2d) (9 Cir.) 153; N. L. R. B. v. Stover, 114 Fed. (2d) (10 Cir.) 513.

(4) The decision of the Circuit Court of Appeals that the Petitioner had refused to bargain collectively with the Union is in conflict with applicable decisions of this Court in that the same is unsupported by substantial testimony.

The Board found that the Petitioner had refused to bargain collectively with the Union (R. 194). The testimony in respect to the charge is found by Alfred Jones (Tr. 430), and the testimony of B. F. Berman (Tr. 493), from which it conclusively and undisputedly admitted that Mr. Berman, appropriate executive of the Company had numerous conferences with the bargaining agent of the Union, but was unable to reach a conclusion. There is not a scintilla of evidence justifying inference that the Petitioner and officers did not bargain sincerely. They were unable to reach an agreement, but proof of failure to reach an agreement is far short of refusing to bargain.

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1; 81 L. Ed. 393; 108 A. L. R. 1352.

(5) For the same reason, the decision of the Circuit Court of Appeals of the Fifth Circuit is in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

N. L. R. B. v. Columbian Enameling & Stamping Co., 306 U. S. 292; N. L. R. B. v. Lion Shoe Co., 97 Fed. (2d) (1st Cir.) 448; Black Diamond S. S. Corp. v. N. L. R. B., 94 Fed. (2d) (2 Cir.) 875.

The decision of the Circuit Court of Appeals is contrary to the decision of this Court dealing with the subject matter and a very marked conflict exists in the various Circuit Courts of Appeal on the questions decided in this case, which should be reconciled. The decision in this case is contrary to decisions in other circuits dealing with the same questions. Therefore, this case is an appropriate one for the exercise by the Court of its authority to review on certiorari.

WHEREFORE, your petitioner respectfully prays that a Writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in this case numbered and entitled on its docket, "Stonewall Cotton Mills, Inc., Petitioner, vs. National Labor Relations Board, Respondent", and that the judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and your Petitioner prays for such other further and general relief in the premises as to this Honorable Court may seem meet and just, and your Petitioner will ever pray.

This petition for certiorari is accompanied by ten printed certified copies of the original and supplemental record with

exhibits, with one certified typewritten copy of the evidence used by the Circuit Court of Appeals of the Fifth Circuit in the determination of the case.

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